definition of the rule, and in which there are no other circumstances which make it inappropriate, and inconvenient, or unjust to apply the power. And when it is spoken of as a power of discretion, it must be remembered that in that sense only is it a power of discretion." (Italics supplied).

His Lordship then went on to quote from Lord Justice James' judgment in *Davy* v. *Garrett*[10] where Lord Justice James had said:

"The argument was strongly pressed upon us that this was an appeal from a matter lying within the discretion of the judge, and an observation of my own in *Watson* v. *Rodwell* (3 Ch. D. 383) was relied on. I do not know whether my expressions were stronger than was required; but it is very important that time and money should not be wasted in appeals on interlocutory matters, and I have therefore always set my face against appeals from the discretion of the judge in matters of procedure. But a defendant may claim *ex debito justitiae* to have the plaintiff's case presented in an intelligible form, so that he may not be embarrassed in meeting it."

Knowles v. *Roberts*[9] was no doubt a case under Order 19 rule 27 but it is indicative of the purpose, limits and extent of the exercise of that discretion. It is for the defendant to show that inspite of the provisions of the Income Tax Act relied upon by the plaintiff and the service of the notices on the defendant under that Act, paragraph 3 of the statement of claim discloses no reasonable cause of action. A cause of action means every fact which, if traversed, it would be necessary for the plaintiff to prove to support his right to the judgment of the court. It includes all material facts on which the suit is founded although it does not comprise every piece of evidence which is necessary to prove each fact but it does include everything which if not proved would give the defendant a right to immediate judgment in his favour.

The plaintiff has brought its present claim under rights conferred on it by statute. In paragraph 3 of the statement of claim it has only sought to give particulars of how the figure of $7,245,901.38 is arrived at. Paragraph 3 of the statement of claim is in fact the very basis of the plaintiff's claim. Is it possible for the plaintiff to proceed with any hope of success in its claim unless the facts alleged in paragraph 3 are proved? Learned counsel for the defendant should have known the answer to that.

The defendant has made no effort to show how the statement of claim discloses no reasonable cause of action against him. It is only that limb of Order 25 rule 4 which deals with the statement of claim disclosing no reasonable cause of action that the defendant wished to rely on. There was no evidence before me which could even remotely suggest that there was no reasonable cause of action disclosed in the statement of claim. There were even no arguments put forward to show that paragraph 3 of the statement of claim disclosed no reasonable cause of action.

The application was consequently dismissed with costs and a certificate under Order 54 rule 22A of the Rules of the Supreme Court issued.

Application dismissed.

Solicitors: *Allen & Gledhill.*

YUE SANG CHEONG SDN. BHD. v. PUBLIC PROSECUTOR

[F.C. (Ong C.J., Gill and Ong Hock Sim F.JJ.)

June 28, 1973]

[Kuala Lumpur — Federal Court Criminal Reference No. 3 of 1973]

Criminal Law and Procedure — Company — Whether limited company can be guilty of criminal offence where mens rea is required and without proof of mens rea of its agent or officers — Reference to Federal Court — Whether Federal Court has any jurisdiction or power beyond answering the questions of law — Whether Federal Court has powers of review — Courts of Judicature Act, 1964 (Act 91), s. 66 — Customs Act, 1967, s. 135(1)(d).

Practice and Procedure — Federal Court — Jurisdiction — Whether Federal Court has powers of review when points of law referred to it — Courts of Judicature Act, 1964, s. 66(5).

Customs — Limited company — Whether can be guilty of offence where mens rea is required — Customs Act, 1967, s. 135(1)(d).

The applicant company had been convicted of the offence of knowingly being in possession of certain prohibited goods and had been fined $1,620. Its appeal against conviction was dismissed by the High Court. Thereupon application was made by the company to refer the following questions of law to the Federal Court —

(1) Whether a limited company charged under section 135(1)(d) of the Customs Act, 1967 can be guilty of such criminal offence without proof of *mens rea* of its agent or officers.

(2) If the answer to (1) is in the negative, whether it is relevant to consider the relative importance of the agents or officers of the limited company whose knowledge is to be imputed to the company.

Held: (1) as *mens rea* was essential for proof of guilt in this case, the limited company could not be guilty of the offence without proof of *mens rea* of its agents or officers;

(2) the persons whose knowledge would be imputed to the company would be those who were entrusted with the exercise of the powers of the company;

(3) (*Per* Ong C.J. and Ong Hock Sim F.J., Gill F.J. dissenting) although the questions referred had been rightly answered by the learned judge who referred the case to the Federal Court, the Federal Court could exercise its power of review and interfere with the decision of the learned judge, if it was satisfied that that decision was wrong.

Cases referred to:

(1) *Tesco Ltd.* v. *Nattrass* [1972] A.C. 154.

(2) *Ibralebbe* v. *Reg.* [1964] 1 All E.R. 251, 257.

(3) *Attorney General for Northern Ireland* v. *Gallagher* [1961] 3 All E.R. 299, 300, 314.

(4) *Miller* v. *Ministry of Pensions* [1947] 2 All E.R. 372.

(5) *Ng Eng Kooi & Anor.* v. *Public Prosecutor* [1970] 1 M.L.J. 267.

(6) *R.* v. *Carr Briant* [1943] K.B. 607.

(7) *R.* v. *Cohen* [1951] All E.R. 203, 206.

(8) *Hadley* v. *Perks* (1886) L.R. 1 Q.B. 444, 457.

(9) *Reg.* v. *Hester* [1972] 3 W.L.R. 910, 921.

FEDERAL COURT.

Zyx Owen for the applicant.

Gunn Chit Tuan and *K. C. Vohrah* (Senior Federal Counsel) for the respondent.

Ong C.J.: In the Sessions Court at Kuala Lumpur the applicant, a limited company, was charged under

section 135(1) (d) of the Customs Act 1967 with knowingly having in its possession on August 17, 1970 eighteen cases of rock sugar the import of which was prohibited under the Customs (Prohibition of Imports) Order 1969. Being convicted of the offence the applicant was fined the sum of $1,620, which was the minimum fixed by law, as the learned president quite properly took into account the fact that this was the very first occasion in about 20 years of trading that the company had transgressed the law. Its appeal against conviction was dismissed by the High Court. Thereupon, application was made by the company to refer the following questions of law for the decision of this court under section 66 of the Courts of Judicature Act 1964, namely —

(1) Whether a limited company charged under section 135(1) (d) of the Customs Act, 1967 can be guilty of such criminal offence without proof of *mens rea* of its agents or officers.

(2) If the answer to (1) is in the negative, whether it is relevant to consider the relative importance of the agents or officers of the limited company whose knowledge is to be imputed to the company.

There is no necessity to deal with these questions separately. The word "knowingly" in section 135(1)(d) clearly imports *mens rea* for proof of guilt. In section 3 of the Interpretation Act 1967 "person" includes a body of persons corporate or unincorporate. The answer to the first question, therefore, must be in the negative.

As to the second question I think the House of Lords decision in *Tesco Ltd.* v. *Nattrass*[1] provides a ready answer. It is neatly summed up in the following passage of the speech by Lord Diplock at page 199:

"In my view, therefore, the question: what natural persons are to be treated in law as being the company for the purpose of acts done in the course of its business, including the taking of precautions and the exercise of due diligence to avoid the commission of a criminal offence, is to be found by identifying those natural persons who by the memorandum and articles of association or as a result of action taken by the directors, or by the company in general meeting pursuant to the articles, are entrusted with the exercise of the powers of the company."

It follows from these answers that, in the ordinary course, the judgment of the High Court dismissing the applicant's appeal against conviction should not be disturbed. My perusal of the evidence on record, however, has left my mind in grave doubt about the guilt of the applicant. Notwithstanding the answers to the questions of law posed in this reference, it is nevertheless the paramount duty of this court to see that, in the last resort, justice is done and any miscarriage of justice rectified.

The facts disclosed in evidence, in my view, were far from satisfactory to justify conviction. The applicant had an unblemished record of trading for over twenty years without ever transgressing the law. Its managing director was able to produce to the Assistant Superintendent of Customs, immediately on demand, three invoices of Makmur Malaya Sendirian Berhad, from whom 30 cases of rock sugar were shown to have been purchased in three lots of 10 cases each on January 8, 17 and 27, 1970. Their total cost was only $166 x 3, or $498. The question which one naturally asks onself is whether a reputable firm would stoop to dealing in "duty unpaid rock sugar", which was what the customs officers were looking for, on which the profit was a mere trifle. Unless any smuggling or importation or illegal purchase is made in such quantities as to make the risk worth while it is reasonable to assume that no respectable person or company is likely to resort to shady practices. Twelve cases out of the 30 had been sold when the customs officers found the balance of 18 cases stacked *openly* with other goods in the front portion of the ground floor. In support of the inference of guilt it was said that there *must* have been a terrific sale of rock sugar by the applicant in January 1970 to justify three purchases made in that month; hence it could not be true that only 12 cases had been disposed of in the seven months preceding the raid. If the supply of 30 cases ran out in response to heavy demand, the 18 cases could not have been bought from Makmur. The learned judge therefore drew the inference on appeal that "under the circumstances, it is impossible to accept the evidence of Mr. Cheah that there was still a balance of eighteen cases bought from Makmur". With respect, this is a *non sequitur*. There is no reason why provision dealers should not lay in stock in excess of immediate demands if, for instance, they expect a supply shortage or increase of price in the future.

The president of the Sessions Court, in finding the applicant guilty, had been strongly influenced by the fact, described by him as crucial, that on one of the 18 cases, the Government Chemist had found markings painted over, but still decipherable, as "C.S.C. H.K." Now, Chee Shang Cheong of Hong Kong — which presumably those initials referred to — was a firm with which the applicant had had dealings. Those markings, it was said, justified the conclusion that, because Makmur never had bought goods from that Hong Kong firm, the rock sugar in the applicant's possession must necessarily have been received from Chee Sang Cheong. The coincidence was thus held to be distinct proof of guilt.

In my opinion, the unfortunate coincidence of having the initials on goods bought by the applicant from Makmur being the same as those of a firm with which the applicant admittedly had dealings was exaggerated to such an extent that other and more weighty evidence *contra* was completely overlooked or ignored.

It was an established fact that Makmur at the relevant time had made their purchases of rock sugar in considerable quantities, namely, two separate consignments of 1,200 cases each, of a total net weight of 30 tons, sold and forwarded by "China National Cereals, Oils and Foodstuffs Import and Export Corporation, Dairen Branch, Dairen, China". It was equally clear in evidence that the applicant had never had any dealings with that Import and Export Corporation in Dairen, China. How then, except through Makmur, could the applicant have obtained goods shown to be produced in Dairen? Of the 18 cases found in the applicant's possession, 2 were sent to the Government Chemist, whose certificate proved that both these cases showed the consignors and country of origin as "China National Cereals, Oils and Foodstuffs Import and Export Corporation, Dairen". In

my view the chemist's certificate on this point is indisputable proof that the applicant's managing director was telling the truth and that the rock sugar in his possession had been bought from Makmur.

If an explanation is needed for the initials "C.S.C. H.K." seen on one of the cases — although the applicant in its defence was not obliged to explain facts for which it was not responsible — a simple and logical one is this. The Hong Kong firm, besides Makmur, had placed an order with the Dairen Corporation, but, in order to make up the total quantity required by Makmur, the consignors had to break bulk from the lot earmarked for Hong Kong, thereby accounting for the appearance of the "C.S.C. H.K." marking and its obliteration.

At the hearing of this reference we asked counsel for further argument on the question whether this court had any jurisdiction or power to go beyond answering the questions of law, if we are satisfied on perusal of the evidence on record that the conviction was wrong. On the one hand it was said that the Federal Court has no powers of review; if this is the correct view, then naturally, if the answers do not require that the judgment of the court below be disturbed, this court cannot do anything more than answer the questions raised.

For my own part, however, I feel that it is not only the right, but also the duty of this court to see that justice is done and seen to be done in all cases brought before us in accordance with established rules of procedure. As Viscount Radcliffe said in *Ibralebbe* v. *Reg.*: [2] "Justice is *owed;* it is not granted by favour or accorded at discretion". If, in the instant case, the conviction was wrong, by reason of its being against the weight of evidence, it surely cannot be right for this court to wear blinkers and treat the questions of law raised as being purely of academic interest and thus allow the conviction to stand.

The powers of this court, in dealing with a reference under section 66 of the Courts of Judicature Act, are set out in sub-section (5), which reads:

"(5) The Federal Court shall hear and determine the question reserved and *may make such orders as the High Court might have made as it may consider just for the disposal of the appeal.*"

In my view the words in italics give this court the same ample jurisdiction it had under the provisions of sub-section (5) of section 34 of the former Courts Ordinance 1948 (now repealed), which laid down that

"the provisions of sections 29, 31 and 32 of this Ordinance shall apply to all appeals heard under the provisions of this section".

Under section 29 the Court of Appeal may

"confirm, reverse or vary the decision of the trial court ... or may make such other order in the matter as to it may seem just and may by such order exercise any power which the trial court might have exercised".

I do not think the rewording of sub-section (5) of the Act has effected any change in the former law, so that the powers of the Federal Court are more restricted than those of the former Court of Appeal.

If authority is needed for my interpretation of these powers, reference may be made to *A-G. for N. Ireland* v. *Gallagher* [3] where the proper construction of section 1 of the Administration of Justice Act 1960 fell to be considered and sub-section (4) reads:

"(4) For the purpose of disposing of an appeal under this section the House of Lords may exercise any powers of the court below or may remit the case to that court."

In that case, Lord Reid said:

"If I had to consider the provisions of sub-section (2) without reference to the earlier law, I would have no doubt that the purpose of sub-section (2) is merely to define the conditions which must be satisfied before leave can be given and that, once leave has been given, its purpose is spent. The court below must certify that a point of law of general public importance is involved; then leave is not to be granted unless further it 'appears', or is thought by that court or this House in deciding whether to give leave, that the point is one which ought to be considered by this House. I would not infer a prohibition against this House considering anything else but that point, and I would find no basis for an inference that this House is permitted to consider some further points but not others which it could normally consider in an ordinary appeal. It is familiar and well known that one thing which this House considers in deciding whether to give leave in a civil case is whether the case involves a point of law which ought to be considered by this House. But, once leave is given, this House can and does consider other points as well."

And Lord Denning expressed a similar view as follows:

"I have thus dealt with the case by considering the point raised by the Court of Criminal Appeal; and by dealing with it, I think it is possible to dispose of the appeal. If it were necessary to consider any other point in order to dispose of the appeal, I would certainly be prepared to do so; for I take the view that, once leave to appeal is given to your Lordships' House, all points are open as well as the point stated; and that it is not correct for the Court of Criminal Appeal to limit the appeal to the point which they consider to be of general public importance."

For the reasons above-stated I would quash the conviction, order the fine refunded and that the goods confiscated or their value be returned to the applicant.

Gill F.J.: This is a reference by the High Court under section 66 of the Courts of Judicature Act, 1964 reserving for the decision of this court the following questions of law of public interest:

(1) Whether a limited company charged under section 135(1) (d) of the Customs Act, 1967 can be guilty of such criminal offence without proof of *mens rea* of its agents or officers;

(2) if the answer to (1) is in the negative, whether it is relevant to consider the relative importance of the agents or officers of the limited company whose knowledge is to be imputed to the company.

The reference is made on the application of Yue Sang Cheong Sendirian Berhad, a limited company, which was charged in the Sessions Court at Kuala Lumpur as follows:

"That you, Yue Sang Cheong Sdn. Bhd. at about 3.00 p.m. on 17.8.70 at No. 44, Jalan Rodger, Kuala Lumpur, Selangor did knowingly have in your possession prohibited goods, wit, 18 cases of rock sugar, such goods being goods the import of which is prohibited under the Customs (Prohibition of Imports) Order, 1969 and you thereby committed an offence under section 135(1) (d) of the Customs Act, 1967, punishable under section 135(1) (iii) of the same."

The managing director of the company, Mr. Cheah Seng Swee, appeared in answer to the charge and claimed to be tried. At the outset of the trial counsel for the defendant company took the point that the

charge should have been brought against the director and not against the company. It was also contended for the company that *mens rea*, which was an essential ingredient of the charge, could not be attributed to a body corporate. The prosecuting officer submitted that, by virtue of the provisions of section 140 of the Customs Act and section 35(3) of the Criminal Procedure Code, the prosecution had the option to proceed either against the company or against its director. In the event, the learned president of the Sessions Court held the charge against the company to be proper and proceeded with the trial.

As the learned president has stated in his grounds of judgment, the case for the prosecution was relatively simple. A party of customs officers raided the premises of the company at No. 44, Jalan Rodger, Kuala Lumpur on August 17, 1970 and recovered from therein eighteen cases of rock sugar. A man then present in the shop said that he did not know what the contents of the boxes were, but Mr. Cheah who came into the shop a little later told the officers what was in the boxes. When questioned as to where the sugar had come from, Mr. Cheah said that it was obtained from Makmur of Jalan Bandar, Kuala Lumpur. He then produced three receipts issued by Makmur covering 30 cases of rock sugar, stating that twelve boxes of sugar had been sold leaving the remaining eighteen boxes in the shop.

The customs party then went to the premises of Makmur Malaya Sendirian Berhad and there met the assistant manager of that company, Mr. Tan Guan Aik, who produced a case of rock sugar bearing the letters of M.M.L. This box was similar in size to the eighteen cases of sugar recovered from the defendant company, the only difference being that some of the eighteen boxes were painted over in black ink or stain so that the letters printed on them could not be read, and that some of the boxes bore the letters C.S.C. which could be read.

The case for the prosecution rested solely on the evidence of Tan Guan Aik (PW4) who testified that the eighteen cases which were recovered from the defendant company were not imported into the country by Makmur. He further said that if the cases were intended for Makmur they would bear the marking MML and that Makmur never used the marking CSC HK.

Under cross-examination, Tan stated that his company was not the sole importer of rock sugar. He said that he inspected the goods which arrived but not every piece. Asked about the packing, he stated that the rock sugar came in boxes as produced in court and not boxed in a large crate. He admitted, however, that he did not know how those boxes were packed in the ship and what they looked like when they were collected by the forwarding agency. When asked to explain about the stock of sugar, he said that Makmur had sold all their stock with the exception of the only box recovered from their store which could not be sold because of its damaged condition. He admitted that he did not know all that happened at Makmur, but went on to say that the only store Makmur had was the one which was examined by the customs.

Speaking of Tan's cross-examination, the learned president says in his grounds of judgment that it was intended to show that Tan had an interest in the case, although it turned out that he was a mere employee. The sole object of the cross-examination, says the learned president, was to show that Makmur was involved in some 'hanky panky stuff'. The conclusion at which he arrived about the evidence of Tan was that it could be accepted in toto. In this connection, he states in his judgment as follows:

> "I think if one keeps ones' eyes open one will see as plain as day light that the markings shown on the boxes are the markings of the importing company. This is to facilitate collection and delivery of the goods. Furthermore, the markings are always on the exterior of the main box and not inside. It may be said that I am drawing this inference without any basis whatsoever but I am of the view that if a fact is so apparent to the ordinary man then that fact need not be proved at all."

In the circumstances, he called on the defendant company to make its defence.

Evidence on behalf of the defendant company was given by Mr. Cheah Seng Swee. Having spoken about the conversation with the customs party on the date of the raid on his premises, he stated that the rock sugar in the shop was purchased from Makmur. He produced his book showing the purchases made from Makmur and Ang Bian Seng, and also the receipts. He said he was not bothered by what the boxes looked like and he presumed that the boxes had been blackened by Makmur. Under cross-examination he said that his company dealt wholesale as well as by retail, that they imported goods from Chee Seng Cheong of Hongkong and that the markings used for such goods were Y.S.C. which were the initials of their company.

On the evidence before him the findings which the learned president made are set out in his grounds of judgment as follows:

> "I have examined the boxes and I have seen that the markings of most of the boxes were painted over. It was only the relevant markings showing the letters of the importing company that were painted over and not the other markings. Even if the other markings were painted over they were not done well indicating that it was not necessary to do that part well.
>
> After examining the ones that were painted over I found that on one box at least the markings could still be read. I saw on that box the letters CSC.
>
> The markings on the boxes are crucial. The markings on some of the 18 boxes show CSC HK which happen to be the initials of Chee Seng Cheong Hong Kong, a company with which defendant company traded.
>
> I am of the view that these markings and painted over marks together with the evidence of PW4 make the case of the prosecution conclusive against the defendant company.
>
> The defendant counsel raised many points and showed many possibilities. I think the court is not interested in mere possibilities and is only concerned if any of the possibilities can be a probability. The test as to the quantum of proof has been stated in many cases again and again but what was stated by Denning J. as he then was in *Miller* v. *Ministry of Pensions*[4] is still a sound guide to me as to what kind of possibilities and doubts I should entertain."

He therefore found the defendant company guilty as charged and, in view of the fact that this was the very first time in about 20 years that the defendant company had had any blemish against its good name, imposed a minimum fine of $1,620.

His conclusions are stated in his grounds of judgment as follows:

"On the evidence before me I found that the defendant has not raised any doubt at all in the prosecution's case and while the managing director himself may be absolved of blame the defendant company cannot. The managing director however is not the person on trial. I find the defendant company guilty as charged."

From the decision of the learned president the defendant company appealed to the High Court. The main ground of appeal was that the learned president had misdirected himself in accepting the evidence of Mr. Tan in toto. In disposing of this ground Mohamed Azmi J. says in his grounds of judgment as follows:

"In my view, having regard to the evidence, including the documentary exhibits, the learned president is perfectly justified in coming to the conclusion that the relevant eighteen cases of rock sugar did not come from Makmur Malaya Sdn. Berhad. The learned president had examined all the cases and had found that the markings on most of them had been painted over. Two of the cases were sent to the Chemistry Department; and from the chemist report (Exhibit P7), it is clear that on one of them the chemist managed to decipher the lettering obliterated as 'CSC HK.'. Now, the CSC HK. markings happened to be the initial of Chee Seng Cheong Hong Kong, a company which the appellant company had been trading with. It should be noted that the appellant company was dealing both wholesale and retail business. From the evidence of Mr. Cheah, the appellant company had imported goods from Hong Kong and as well as Communist China from and through Chee Seng Cheong Hong Kong. I therefore find no reason to disturb the finding of fact of the learned president that those eighteen cases of rock sugar could not have been bought from Makmur as alleged by the defence. It is true that, prior to the date of the customs raid, the appellant company had bought thirty cases of rock sugar from Makmur as shown in the three invoices (Exhibits P1AT, P1BT and P1CT), but it is relevant to note that these purchases were made about seven months before the customs raid. These three purchases were made on the 8th, 17th and 27th January, 1970. It can therefore be reasonably inferred that there must be terrific sale of rock sugar by the appellant company in January 1970. Under the circumstances, it is impossible to accept the evidence of Mr. Cheah that in August 1970 there was still a balance of eighteen cases bought from Makmur. Further, the samples of rock sugar taken from the appellant company (marked A and B) and the sample taken from Makmur (marked C) showed a difference in strength (see chemist report Exhibit P7 and Exhibit P8). The polarisation of the appellant company's rock sugar exceeded 99°, whereas that of Makmur did not exceed that degree. It should also be noted that Makmur Malaya Sdn. Berhad was also dealing in imports and exports of goods. According to Mr. Tan, who was in charge of imports and exports, the company had imported rock sugar only twice. This is supported by Exhibit P4B which shows that it had import licence to do so till December 31, 1968, and Exhibit P4A which shows that it had another import licence valid till September 30, 1969. From the evidence, 1,200 cases of rock sugar were imported by Makmur by the end of September 1969, and by the time the customs came to check the company's stock on August 17, 1970, there was only one case left (Exhibit P2) which could not be sold due to some damage. Since Makmur had valid licence to import rock sugar and it had admittedly sold thirty cases of the goods to the appellant company in January 1970, there is no reason why Mr. Tan should falsely testify that the subject-matter of the charge was not bought from Makmur. The appellant company continued to buy rock sugar from Makmur even after the customs raid and the relationship between the two companies appeared to be cordial. There is therefore no reason why the evidence of Mr. Tan should not be relied upon by the learned president. Under the circumstances, the only reasonable inference to be drawn from the evidence is that the thirty cases of rock sugar bought from Makmur must have already been disposed of by the time the customs raid took place, and that the eighteen cases recovered by the customs could not possibly be the left-over of the purchases made from Makmur in January 1970. In my judgment, the learned president was therefore right in finding that the defence had not raised any doubt at all in the prosecution case. It is clear from his grounds of judgment that he did not accept the evidence of Mr. Cheah, the managing director of the appellant company, as regards the origin of the eighteen cases of rock sugar, and that the defence had neither discharged the burden of proof under section 119 nor rebutted the presumption under section 135(2) of the Customs Act. The burden of proof on the defence to rebut the statutory presumption is, of course, based on the test of 'satisfaction on the balance of probabilities' as enunciated by the Federal Court in the case of *Ng Eng Kooi & Anor.* v. *Public Prosecutor.*"[5]

The other main ground of appeal was that a company can only be criminally liable if its servant or agent has the *mens rea* and that this *mens rea* can be imputed to the company. This ground was directed towards that part of the learned president's grounds of judgment where he stated:

"On the evidence before me I found that the defendant has not raised any doubt at all in the prosecution's case and while the managing director himself may be absolved of blame the defendant company cannot. The managing director however is not the person on trial. I find the defendant company guilty as charged."

It was argued that, since the learned president had come to the conclusion that the managing director was free from blame, there was no blame to be imputed to the company. The learned judge rejected this argument for the reasons which he stated in his grounds of judgment as follows:

"In my judgment, the words used by the learned president that 'the managing director himself may be absolved of blame' should not be read out of context. They cannot be interpreted as a finding of fact that Mr. Cheah had no knowledge that the eighteen cases of rock sugar were prohibited goods in view of the rejection of his evidence by the learned president that the said rock sugar had originated from Makmur Malaya Sdn. Berhad. Under section 135(2) of the Customs Act, in any prosecution under section 135 any prohibited goods shall be deemed to be prohibited goods to the knowledge of the defendant unless the contrary be proved by such defendant. Since the learned president had rejected Mr. Cheah's evidence and had accepted the evidence of Mr. Tan in toto, he had no alternative but to find the appellant company guilty of the offence. In my opinion, what the learned president had said regarding 'the managing director himself may be absolved of blame' should be viewed in the context of the provision of section 140(1) of the Customs Act".

Section 140(1) of the Customs Act provides that

"where an offence against this Act or any regulation made thereunder has been committed by a company, firm, society or other body of persons, any person who at the time of the commission of the offence was a director, manager, secretary or other similar officer or a partner of the company, firm, society or other body of persons or was purporting to act in such capacity shall be deemed to be guilty of that offence unless he proves that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances."

In interpreting that section the learned judge has stated as follows:

"To my mind, in a prosecution under the Customs Act or Regulations the prosecution has the option to proceed against a company, or its responsible officer, or against both. Where the prosecution has opted to proceed only against the company, as in the present case, the summons may be served on the secretary or other like officer of the company under section 35(iii) of the Criminal Procedure Code. In the instant case, Mr. Cheah, the managing director, who must have been served with the summons appeared in court to represent the company. Although Mr. Cheah could have been jointly tried

with the company, the prosecution had decided only to charge the appellant company. In that event, for a charge under section 135(1)(d), once possession of the prohibited goods has been proved, the statutory presumption that the goods to the knowledge of the company arises under section 135(2), and the court is obliged to call for the defence unless the court is satisfied from the evidence adduced by the prosecution witnesses itself that the statutory presumption has been rebutted. In other words, as far as *mens rea* is concerned, the prosecution is entitled to rely on the statutory presumption, and it is not incumbent on the prosecution to prove it through the agent or officer of the company. Once the defence is called, the court must be prepared at that stage to convict the company if no evidence is adduced by the defence. In the present case, evidence was adduced by Mr. Cheah on behalf of the appellant company to rebut the presumption under section 135(2). On the balance of probabilities, the learned president had rightly rejected the testimony of Mr. Cheah, leaving the statutory presumption as to knowledge unrebutted. He accordingly convicted the appellant company."

In the result the learned judge dismissed the appeal, but granted the company's application to refer the matter to this court under section 66 of the Courts of Judicature Act, 1964.

That brings me to the two questions of law for the decision of this court. I agree with respect with the learned Chief Justice that the answer to the first question must be in the negative, since the word "knowingly" in section 135(1)(d) clearly imports *mens rea* for proof of guilt and "person" as defined in section 3 of the Interpretation Act, 1967 includes a body of persons corporate or incorporate. Indeed, the learned judge in the court himself answered the question correctly when he cited with approval the following passage from *Halsbury*, Volume 6, Third Edition, page 440, paragraph 853:

"A company cannot be guilty of any criminal offences which, by their very nature, can only be committed by natural persons (such as bigamy) nor of those which cannot be committed vicariously (such as perjury). A company cannot be indicted for a crime where the only punishment is death or imprisonment.

Apart from such exceptions, a company may be guilty both of statutory and common law offences, even although the latter involves *mens rea*.

The company can only commit crimes by its agents, who must themselves be responsible for the crime, and it is a question in each case whether the act of the agent, including his state of mind, is the act of the company."

I also agree with respect with the learned Chief Justice when he says that as to the second question the decision of the House of Lords in *Tesco Ltd.* v. *Nattrass*[1] provides a ready answer. Here again, the question was rightly answered by the learned appeal judge himself as is abundantly clear from his grounds of judgment.

It is to be observed that section 66(1) of the Courts of Judicature Act provides for the reservation for the decision of this court *"any question of law of public interest which has arisen in the course of the appeal and the determination of which by the judge has affected the event of the appeal"*. As I have already said, the questions of law which arose in the course of the appeal and which affected the event of the appeal were correctly determined by the learned judge. It therefore follows that his judgment dismissing the applicant's appeal against conviction cannot be disturbed. In my judgment this court has no jurisdiction to interfere with the decision of the appeal judge, unless it finds that in determining the appeal he misdirected himself on the questions of law reserved for the decision of this court. In other words, if this court answers the questions of law reserved in the same way as the appeal judge himself did, there is no option but to affirm his judgment.

Section 66(5) of the Courts of Judicature Act provides:

"The Federal Court shall hear and determine the question reserved and may make such orders as the High Court might have made as it may consider just for the disposal of the appeal."

In my judgment, the correct interpretation of those words is that this court cannot make a different order from that made by the appeal judge, unless the making of such different order arises directly from the answers given by this court to the questions of law reserved. In expressing this as my view I regret to say that I differ from the view expressed by the learned Chief Justice that sub-section (5) of section 34 of the former Courts Ordinance, 1948 (now repealed) has a bearing on the case. What governs this case is section 66 of the Courts Judicature Act, 1964.

It is also to be observed that section 66 of the Courts of Judicature Act gives no further right of appeal as such to a person who has been convicted in a lower court and his conviction has been upheld on appeal by the High Court. In this connection, I asked counsel whether the applicant would have had any other remedy if the High Court had refused his application to refer the questions of law to this court. The answer of course was, no.

One other observation which I wish to make is that counsel for the applicant made no attempt to argue that it was open to this court to disturb the findings of fact made by the learned president and upheld by the High Court. Indeed, my recollection is that he did not say a word to that effect. There was certainly no suggestion on his part that there had been a miscarriage of justice in this case. In any event, justice means justice according to the law. Even if I were to assume that this court can deal with this reference as if it were an appeal, I can find no justification for disturbing the findings of fact made by the learned president of the Sessions Court and upheld by the learned judge on appeal. Indeed, for this court to disturb those findings of fact would be unprecedented. I need hardly point out that this court has no revisionary powers over appeals from lower courts to the High Court in criminal matters.

Having answered the two questions of law, I would affirm the decision of the High Court and make an order that the appeal do stand dismissed.

Ong Hock Sim F.J.: The questions of law reserved for the determination of this court under section 66 of the Courts of Judicature Act (Laws of Malaysia, Act 91) and the answers thereto (with which I agree) appear in the judgments in draft of the learned Chief Justice and Gill F.J.

The question, which has now to be considered, in the words of the Chief Justice, is "whether this court has jurisdiction or power to go beyond answering the questions of law if we are satisfied on perusal

of the record that the conviction was wrong". He went on to say that if the correct view denies this court any powers of review, "then naturally, if the answers do not require that the judgment of the court below be disturbed, this court cannot do anything more than answer the questions raised".

This latter view is that of my brother Gill F.J. who says "this court has no jurisdiction to interfere with the decision of the appeal judge, unless it finds that in determining the appeal he misdirected himself on the questions of law reserved for the decision of this court" In his opinion, this court has no revisionary powers over appeals from lower courts to the High Court in criminal matters and having regard to the answers, the decision of the High Court should be affirmed and the appeal dismissed.

The Chief Justice considers that it is the paramount duty of this court to see that, in the last resort, justice is done and any miscarriage of justice rectified. He says that a perusal of the evidence on record left him in grave doubt about the guilt of the appellant. I am of the same mind and I may add that there appears to have been a considerable degree of confusion in the antecedent proceedings, as revealed by evidence on the record.

Encik Hashim (P.W.2) took one case (Ex.P.2) from Mr. Tan (P.W.4) of Makmur. I find no evidence whatsoever on the record showing that this exhibit imported by Makmur bore the letters M.M.L. as stated by the learned president in his judgment. Therefore, if this one case, admittedly Makmur's, bore no identifying mark or initials connecting it with Makmur, how could the 18 cases bought by the applicant from Makmur be expected to bear such identification? P.W.2 stated for a fact Tan Guan Aik looked at the 18 cases of rock-sugar shown to him "and found that the markings on the cases showed CSC HK." What Mr. Tan (P.W.4) did say was "I was shown 18 cases (identifies P5 A-R.). If cases were imported by us, then the cases would be marked MML or sometimes in Chinese characters." Exhibit (D.11), a box of rock-sugar purchased from Makmur, was produced by Mr. Cheah (D.W.1) and the prosecuting officer is recorded as saying (p. 21 of the record) "D.11 shows Makmur's marking CSC HK". This statement of fact can only mean, and must mean, that D.11 came from Makmur and the fact that C.S.C. H.K. appeared also on the cases in the applicant's possession could not necessarily mean that the applicant received them from Chee Sang Cheong Hong Kong, merely because the applicant used to buy *other* goods from that Hong Kong firm. At the close of the case therefore the verdict should have been an acquittal, supported as it was by the chemist's examination (P.7) of the two cases, showing clearly the consignors and country of origin to be "China National Cereals, Oils and Foodstuffs Import and Export, Dairen" from whom Makmur was authorised according to the invoices (P.4A and B) to import rock sugar.

Mr. Tan (P.W.4), whose evidence was accepted *in toto*, said that if the 18 cases were imported by them, they should have the lettering "MML". Although he said markings on P5A-R are not Makmur's merely because "CSC HK" marking was not used by his company, *he was manifestly wrong because D11 in fact bore "CSC HK" markings which the Prosecuting Officer stated were Makmur's.* Accordingly the president erred in saying "According to PW4 (Tan) the 18 cases... were not imported... by Makmur simply because if the goods were intended for Makmur, then the boxes would bear the markings M.M.L." According to PW4, Makmur never used the markings "CSC HK". The truth, however, is that "C.S.C. HK" did appear on D11 and P2. To credit a "mere employee" (who, no doubt, was concerned only to say whatever he thought likely to save his employer from "involvement" in trouble) and to accept his evidence *in toto*, in the face of documentary and other evidence directly contradicting him as establishing the guilt of the defendant company is, in my view, a serious misdirection. The confusion of thought was in the president's treating "Y.S.C." and "CSC HK" as synonymous. He says: "if one keeps one's eyes open, one will see as plain as daylight, the markings shown on the boxes are the markings of the *importing* company. ... The markings are always on the exterior of the main box and not inside.... When goods were imported by the defendant company then the markings used were Y.S.C. which are the initials of the defendant company. Sometimes the words Kuala Lumpur or Port Swettenham were written under the letter Y.S.C.".

Earlier the president said only some of the 18 cases were painted over or stained, but on some, the letters printed could be read, showing the letters CSC. He said later in his judgment: "I have examined the boxes and I have seen that the markings of most of the boxes were painted over. It was *only the relevant markings* showing the letters of the *importing* company that were painted over *and not the other markings.* Even if *the other markings* were painted over, they *were not done well,* indicating that it was *not necessary to do that part well.* After examining the ones that were painted over, *I found that on one box at least,* the markings could still be read. I saw *on that box* the letters CSC." So what? It is important to remember that, according to the prosecuting officer, "CSC were Makmur's markings."

In view of the prosecuting officer's admission that D11 shows Makmur's markings as CSC HK., the defendant company had clearly rebutted the presumption under section 135(2) and the balance of probabilities cannot be otherwise (*Ng Eng Kooi & Anor.* v. *Public Prosecutor*[5]). It was found that the markings on some of the 18 boxes (*one* deciphered by the chemist) bore CSC HK. lettering. But both boxes examined by the chemist showed the consignors and country of origin to be the same as appear in invoices P4A and B. The quantum of proof demanded of the defendant company by the president seemed to be higher than that stated by Lord Denning in *Miller's* case. It seemed to be proof beyond shadow of a doubt.

There is again a misconception as to the nature of the charge. Section 135(1)(d) referred to uncustomed or prohibited goods. Section 2 gives a separate definition of each. The charge referred to possession of prohibited goods. In his judgment, the president said: "The defendant company had not been able to show that the goods were not uncustomed, that

duty had been paid. I *therefore* called on the defendant company to make its defence."

Section 135(2) of the Customs Act reads:

"(2) In any prosecution under this section or section 139 any dutiable, uncustomed or prohibited goods shall be deemed to be dutiable, uncustomed or prohibited goods, as the case may be, to the knowledge of the defendant *unless the contrary be proved by such defendant.*"

These italic words were construed in *Carr-Briant's*[6] case:

"In our judgment, in any case where, either by statute or at common law, some matter is presumed 'unless the contrary is proved,' the jury should be directed that it is for them to decide whether the contrary is proved, that the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt, and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish."

If the president required proof that duty had been paid, he had not been referred to *R.* v. *Cohen.*[7] There Lord Goddard C.J. said:

"A simple way of proving lack of knowledge is to prove that the goods were bought in the ordinary course of trade. If a man buys a box of cigars in a shop at the ordinary price, why should it be supposed that he knew they had been smuggled, if, in fact, they had been?"

and quoting in the same case from the unreported case of *R.* v. *Fitzgerald*:

"If a man buys something from a trader in the ordinary way (it does not matter whether it is wholesale or retail), you would presume that he has bought it honestly and that the duty on it has been paid."

Can this court intervene? Section 66 is, in my view, a re-enactment of section 34 of the Courts Ordinance, 1948. I believe only sub-section (5) need to be construed. It reads:

"(5) The Federal Court shall hear and determine the question reserved and may make such orders as the High Court might have made as it consider just for the disposal of the appeal."

This sub-section replaces the old sub-section (5) of section 34 of the old Ordinance, which I reproduce:

"(5) The provisions of section 29, 31 and 32 of this Ordinance shall apply to all appeals heard under the provisions of this section:

Provided that for the purposes of section 32 of this Ordinance the court to which the Court of Appeal certifies its judgment or order shall be the trial court."

Section 29 defines the powers and I quote:

"29. (1) At the hearing of an appeal the Court of Appeal shall hear the appellant or his advocate and solicitor, if he appears, and, if it thinks fit, the respondent or his advocate and solicitor, if he appears, and may hear the appellant or his advocate and solicitor in reply, and the Court of Appeal may thereupon confirm, reverse or vary the decision of the trial court, or may order a re-trial or may remit the matter with the opinion of the Court of Appeal thereon to the trial court, *or may make such other order in the matter as to it may seem just*, and may by such order exercise any power which the trial court might have exercised:

Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred."

In my opinion, sub-section (5) of Act 91 was not intended to derogate from the powers exercisable under the old Ordinance. It was, as Blackburn J. said in *Hadley* v. *Perks*:[8]

"In drawing Acts of Parliament, the legislature, as it would seem, to improve the graces of the style, and to avoid using the same words over and over again, constantly change the words without intending to change the meaning."

With respect, I am unable to agree with Gill F.J. that the correct interpretation of sub-section (5) is that "this court cannot make a different order from that made by the appeal judge, unless the making of such different order arises directly from the answers given by this court to the questions of law reserved". If that were the intention of the legislature, all that was required would be the insertion of the words "in relation thereto" after "such orders". The words "as it may consider just" would seem to be surplusage. I am of the view that on a true construction, sub-section (5) empowers the court to make all *such* orders *"as it may consider just"*.

In *Reg.* v. *Hester*,[9] notwithstanding that the point of law of general public importance was decided in favour of the Director of Public Prosecutions, it was stated by Lord Morris of Borth-y-Gest:

"Among the grounds of appeal raised by the respondent on appeal to the Court of Appeal were the grounds that the deputy chairman had wrongly refused to withdraw the case at the close of the case for the prosecution and that there were circumstances in the case which made it unsafe and unsatisfactory to allow the conviction to stand. Having allowed the appeal on the legal point and (while having in mind the provisions of section 37(5) of the Criminal Appeal Act 1968) having discharged the respondent, it was unnecessary for the Court of Appeal to deal more fully with the facts of the case. It is to be observed, however, that during the discussion as to giving leave to appeal Phillimore L.J. observed that his impression on a reading of the case was that he would, irrespective of the legal issue, have been tempted to withdraw the case from the jury. In my brief review of the facts I have indicated that there were certain features of the case which would raise doubt as to whether it would be safe and satisfactory to allow the conviction to stand. I need not revert to these features or now elaborate them since, on behalf of the Crown, it has been fairly stated that an acceptance of the contention that it would be unsafe and unsatisfactory to allow the conviction to stand is not resisted. For this reason therefore I would dismiss the appeal."

In the light of the unsatisfactory features of the trial which I have referred to, and which have occasioned, in my view, a failure of justice, this court cannot, and should not, say that it is not required to do more than answering the questions posed. It must do justice and that must be the setting aside of a conviction, unsupportable, in fact and in law.

I am in agreement with the Chief Justice that the conviction be quashed and the fine refunded. I also agree that the 18 cases or its value be returned to the applicant.

Questions answered.

Solicitors: *Fernandez & Co.*